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No. 96-956

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

CITIZENS' UTILITY RATEPAYER BOARD,
Petitioner,
v.
KANSAS PIPELINE PARTNERSHIP,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Kansas

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BRIEF IN OPPOSITION OF RESPONDENT KANSAS PIPELINE PARTNERSHIP

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QUESTIONS PRESENTED

1. Does this Court have jurisdiction to hear Petitioner's claim, which was neither passed upon by, nor properly presented to, the Kansas courts?

2. Assuming this Court has jurisdiction, should it grant certiorari to consider a claim, repeatedly waived below, to correct the alleged denial of a state procedural right, when (a) the alleged right does not exist under Kansas law, (b) even if it did, long and well-established precedent of this Court establishes that Petitioner does not have the constitutionally-protected "property interest" it claims; and (c) Petitioner received far more process than was required in any event?

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondent Kansas Pipeline Partnership states that it is a general partnership and has no corporate parents or subsidiaries that have issued shares to the public.

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BRIEF IN OPPOSITION OF RESPONDENT KANSAS PIPELINE PARTNERSHIP

Respondent Kansas Pipeline Partnership ("KPP") respectfully submits this brief in opposition to the petition filed by the Citizens' Utility Ratepayer Board ("CURB") for a writ of certiorari to review a decision of the Supreme Court of Kansas. The decision of the Kansas Supreme Court is unreported and reprinted as Appendix A to CURB's Petition.

The question presented in CURB's Petition is virtually identical to that presented in the Petition for Writ of Ceritorari filed by Williams Natural Gas Company ("WNG") on November 19, 1996 (Docket No. 96-778), which seeks review of the same Kansas Supreme Court decision. KPP filed a Brief in Opposition to WNG's Petition on December 19, 1996 ("KPP Opp."). To avoid

duplication, KPP has, where appropriate, incorporated by reference its Brief in Opposition to WNG's Petition.

COUNTERSTATEMENT AS TO JURISDICTION

This Court lacks jurisdiction over the Petition under 28 U.S.C. § 1257, the statute invoked by CURB, because the question CURB presents was neither passed on nor properly presented to the Kansas courts.[1]

COUNTERSTATEMENT OF THE CASE

A. The Kansas Statutory Scheme

In March 1995, KPP filed five proposed natural gas contracts with the Kansas Corporation Commission ("KCC") pursuant to Kan. Stat. Ann. § 66-117. That statute requires a utility to file with the KCC any changes to its rates, charges, rules or practices, and allows the KCC to suspend the effectiveness of, and to hold a hearing on, the proposed changes. Hearings under the statute are discretionary. *See* § 66-117(b) ("[T]he commission . . . may give notice and hold a hearing upon such proposed changes."). Section 66-117 strictly limits the KCC's suspension power by providing a maximum period of suspension, and by mandating that the proposed changes be "deemed approved" if the KCC fails to issue a decision within that period. *Id.*

KPP incorporates by reference pages 3-5 of its Brief in Opposition to WNG's Petition, which provide a more detailed discussion of the Kansas statutory scheme.

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[1] Like WNG's Petition, CURB's Petition also seeks a writ directed to the wrong court. Because the Kansas Supreme Court's denial of CURB's petition for review was discretionary, CURB should have sought a writ directed to the Kansas Court of Appeals. *American Ry. Express Co. v. Levee*, 263 U.S. 19, 20-21 (1923) (intermediate court of appeals is "highest Court of the State" under 28 U.S.C. § 1257 if state supreme court denies discretionary review).

B. The Proceedings in This Case

In response to KPP's filing, the KCC issued Suspension Orders under § 66-117 in April 1995, suspending the effectiveness of the contracts so that it could conduct a "full investigation of this matter, which *may* result in a hearing." (1 Rec. 143a, 143c) (emphasis supplied). CURB, an agency of the Kansas government authorized to intervene in certain KCC proceedings, thereafter moved the KCC "for an order permitting it to intervene in the . . . proceeding." (1 Rec. 178.) CURB's Petition for Leave to Intervene stated that

> CURB is requesting *permission* to intervene in this docket to represent the interests of Kansas Pipeline Partnership's residential and small commercial ratepayers. The rates paid and service received by those customers will or may be affected by the Commission order in this proceeding. (*Id.* at 179) (emphasis supplied).

Kan. Stat. Ann. § 66-1223 authorizes CURB to, among other things, employ a "consumer counsel" to represent residential and small commercial ratepayers before the KCC and to seek intervention in KCC proceedings.[2] As CURB's motion requesting "permission" for "leave" to intervene itself makes clear, this statute does not provide CURB any "right" to intervene. It merely authorizes CURB to act in a representative capacity before the KCC.

After CURB's petition to intervene was granted, CURB participated in the hearing with the same status as WNG and all other intervenors. In particular, CURB was subject to KCC regulations providing that its participation could be limited at the time intervention was granted, or "at any subsequent time," Kan. Admin. Reg. § 82-1-225(c), and that its admission as an intervenor "shall not be construed as recognition by the commission

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[2] The statute is App. I to CURB's Petition.

that the intervenor might be aggrieved by any order of the commission in the proceeding." Kan. Admin. Reg. § 82-1-204(i). *See* KPP Opp. at 21.

CURB was, in fact, far less active in the KCC proceeding than was WNG. In response to KPP's showing that the contracts at issue would advance competition and decrease costs to ratepayers,[3] CURB did not offer a single witness. CURB also chose to engage in only limited cross-examination of witnesses at the hearing, foregoing cross-examination of 18 of the 23 witnesses altogether. In sum, CURB offered no testimony to contradict KPP's showing that approval of the contracts was in the public interest.[4]

After the hearing was concluded, the KCC declined to rule within the statutory period. Acting on KPP's appeal, the Kansas Court of Appeals held that the KPP contracts were thus deemed approved as of the end of the KCC's statutory time period in which to act. *Kansas Pipeline*

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[3] For example, KPP demonstrated that (1) under three of the contracts at issue services would be priced at the *lower* of WNG's equivalent rate or KPP's existing KCC-approved cost of service based rate (1 Rec. 15-17, 32-35, 50-53, 152-6, 152-10; 11 Rec. 2643-6, 2643-8); (2) the already-existing contract would continue at KCC-approved rates for 5 years and then drop to the lower of those rates or the WNG price (1 Rec. 152-7; 11 Rec. 2643-9 to 2643-10); and (3) the remaining contract provided a flat rate consistent with KPP's KCC-approved terms and conditions (1 Rec. 152-38), and less expensive than the existing (WNG) alternative. (7 Rec. 259, 263-64, 270-75, 306, 326; 26 Rec. 47-52.)

[4] It has been recognized that a group's claim to represent consumer or public interests does not necessarily mean that its positions actually further those interests. For example, "in hearings before the Federal Power Commission on national gas prices, both sides had a legitimate claim to representing the consumer—one stressing lower prices and the other stressing the need to avert a shortage." Stephen Breyer, *Regulation and Its Reform* 352 (1982). Moreover, "the advocate may feel pressure to maintain a position that, when communicated through the media, will recognizably fall within the current stereotype of the public interest position." *Id.* at 353.

Partnership v. State Corp. Comm'n, 916 P.2d 76 (Kan. Ct. App. 1996). CURB, like WNG, then asserted for the first time that § 66-117 is unconstitutional, a claim that was untimely under Kansas law. Like WNG, CURB concedes that the Kansas courts did not consider its constitutional challenge. CURB Pet. at 4.

SUMMARY OF REASONS FOR DENYING THE WRIT

This Court lacks jurisdiction to decide whether Kan. Stat. Ann. § 66-117 is unconstitutional because CURB repeatedly failed to present the issue properly in the proceedings below. In any event, CURB has failed to present "compelling reasons" for this Court to grant certiorari.

CURB contends that it was deprived of procedural rights due it as a intervenor under Kansas law when KPP's contracts were deemed approved by operation of law without a "determination on the merits." This Court, however, has consistently refused to hear claims alleging misapplication of state law. CURB also fails to identify any unsettled issue of law or conflict among the lower courts concerning such "deemed approval" provisions, which many states have adopted, and does not cite a single case even questioning the constitutionality of such statutes. Moreover, since the Federal Energy Regulatory Commission has recently announced it may assert jurisdiction over the KPP contracts at issue, the matter could soon well be moot.

CURB's "due process" claim is without merit. Under Kansas law, CURB had no right to a hearing or a "decision on the merits." CURB merely had the authority to seek permissive intervention in the KCC proceeding, which, once granted, can be limited by the KCC at any time and is subject to state law governing the proceeding, including the "deemed approval" provision. Moreover, under long-established precedent of this Court, no constitutionally-protected interest of CURB was implicated.

The Kansas ratepayers whom CURB claims to represent have no protected property interest in the rates to be charged under KPP's contracts; nor did CURB have any such interest in its ability to intervene. In any event, CURB was in fact heard in the KCC proceeding. Its Petition should be denied.

REASONS FOR DENYING THE WRIT

CURB's Petition presents the same issue raised in WNG's Petition, and lacks merit for the reasons set forth in KPP's Brief in Opposition to WNG's Petition.[5] CURB, like WNG, failed to properly raise its constitutional challenge in the proceedings below to allow the Kansas appellate courts to pass upon the constitutional issue. *See* KPP Opp. at 15-16. CURB, like WNG, presents no unsettled question of law, and essentially claims a violation of state procedural rights, the type of claim this Court does not entertain. *Id.* at 16-18. CURB, like WNG, asks this Court to decide a question which may very well in the near future become moot. *Id.* at 19-20. Finally, like WNG, CURB and the Kansas ratepayers it claims to represent have no constitutionally-protected property interest that is implicated here. *Id.* at 20-24.

I. THIS COURT DOES NOT HAVE JURISDICTION TO HEAR CURB'S PETITION

Like WNG, CURB failed to properly raise its constitutional challenge in the proceedings below, thus depriving this Court of jurisdiction to decide the question. CURB states in its Petition that it first raised its constitutional argument in its Petition for Review in the Supreme Court of Kansas. CURB Pet. at 4. WNG raised the issue for the first time in its petition for rehearing en banc before the Kansas Court of Appeals. Regardless of whether the issue was raised for the first time in the Kansas Supreme

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[5] KPP incorporates by reference pages 13-24 of its Brief in Opposition to WNG's Petition.

Court or in a petition for rehearing before the Kansas Court of Appeals, CURB's failure to raise the argument first before the KCC and then to the Kansas Court of Appeals before that court issued its decision deprives this Court of jurisdiction to decide the question. *See* KPP Opp. at 13-16.[6]

Applicability of the "deemed approval" provision of § 66-117(b) was squarely at issue before the KCC, *see* KPP Opp. at 11, and before the Kansas Court of Appeals, which termed it the "core question" of the appeal. 916 P.2d at 81. Kansas law makes clear that CURB was required to raise any claim that application of this statute would be unconstitutional to the KCC, Kan. Stat. Ann. § 66-118b, and again by cross-appeal to the Kansas Court of Appeals, if it wished to preserve that issue. *See In re News Publishing Co.*, 743 P.2d 559 (Kan. Ct. App. 1987) (constitutional issue waived where appellee did not raise it by cross-appeal, even though appellee prevailed on other grounds below). CURB was not permitted to wait and see whether the Kansas Court of Appeals would apply the statute, and then belatedly raise a constitutional challenge to it—this is a tactic the Kansas Supreme Court has stated "smacks of trial by ambush." *McVay v. Rich*, 874 P.2d 641, 647 (Kan. 1994).

II. JUST AS KPP'S COMPETITOR WNG HAS NO PROPERTY INTEREST PROTECTED BY STATE LAW AND RECOGNIZED UNDER THE FOURTEENTH AMENDMENT, CURB HAS NO SUCH INTEREST

CURB overreaches in asserting that the Kansas legislature "created a statutory cause of action through CURB to protect and advance the interests of . . . ratepayers."

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[6] Indeed, in a related case involving Kan. Stat. Ann. § 66-117(b) now pending before the Kansas Court of Appeals, CURB once again failed to raise any challenge to the constitutionality of the statute in its appeal brief. *Western Resources, Inc. v. State Corp. Comm'n*, No. 96-77,681-A (Kan. Ct. App. argued Dec. 18, 1996).

CURB Pet. at 10. Far from "creating" a cause of action, CURB's authorizing statute simply gives CURB's consumer counsel the authority to represent certain ratepayers in specified types of proceedings. Kan. Stat. Ann. § 66-1223. This authority includes, in appropriate cases, the opportunity to seek permissive intervention under generally applicable intervention procedures.

A statutory grant of authority to seek intervention does not, however, rise to the level of a constitutionally-protected property interest. Indeed, even a statutory right to intervene does not create such an interest. *West Farms Assocs. v. Connecticut Traffic Comm'n*, 951 F.2d 469, 472-73 (2d Cir. 1991) (right to intervene in state proceeding does not create the "individual entitlement" necessary for a protected property interest). *See Archie v. City of Racine*, 847 F.2d 1211, 1217 (7th Cir. 1988) (*en banc*) ("[I]f state law establishes procedural entitlements, these are not themselves property and will not be enforced in the name of the Constitution.")[7]

Kansas law makes clear that a grant of intervention creates no protected "entitlement" or "property interest." Kan. Admin. Reg. § 82-1-204(i) specifically provides that "[a]dmission as an intervenor shall not be construed as recognition by the commission that the intervenor might be aggrieved by any order of the commission in the proceeding." The power to grant intervention "enables the commission to pursue a commendable liberal policy in permitting participation by parties desiring to intervene in commission proceedings." *Kansas-Nebraska Natural Gas Co. v. State Corp. Comm'n*, 473 P.2d 27, 30 (Kan. 1970). However, the intervenor's participation can be limited by the presiding officer "either at the time that intervention

[7] *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), on which CURB relies, provides no support for its claim. *Logan* involved a plaintiff deprived of his own cause of action; CURB had no cause of action, and merely invoked a procedure to intervene in KPP's action.

is granted or *at any subsequent time*." Kan. Admin. Reg. § 82-1-225(c) (emphasis supplied).

A procedural privilege that is liberally granted absent any showing of individual entitlement, and that can be subsequently limited at any time, is the very antithesis of a "property right." Yet that is all that CURB had. *See* KPP Opp. at 20-24.

CURB purports to represent Kansas ratepayers who are KPP's potential customers, while WNG is a KPP competitor. Neither has any property interest protected by state law and recognized under the Fourteenth Amendment. State and federal courts have long held that parties other than a utility itself, specifically including ratepayers, have no property interest with respect to the utility's rates, and hence no right to a hearing or other due process with respect to changes in those rates. *See, e.g., Wright v. Central Kentucky Natural Gas Co.*, 297 U.S. 537, 542 (1936) (natural gas customers have no vested rights in rates set by agreement between city and utility); *Crosby v. City of Jackson*, 813 F. Supp. 476, 477-78 (S.D. Miss.) (following "numerous cases holding that consumers do not have a protected property interest in utility rates encompassed within the scope of 'life, liberty or property' under the Fourteenth and Fifth Amendments"), *aff'd mem.*, 5 F.3d 528 (5th Cir. 1993); *Sellers v. Iowa Power & Light Co.*, 372 F. Supp. 1169, 1172 (S.D. Iowa 1974) ("utility customers have no vested rights in any fixed utility rates," citing numerous federal and state cases). Kansas courts follow these cases. *Harrison v. Long*, 734 P.2d 1155, 1159 (Kan. 1987) ("Interests which have been held not to be protected by the due process clause include . . . utility rates . . . .")

CURB had no right to a hearing under Kansas law—both the hearing and CURB's own intervention were discretionary. Even if CURB were able to show it had a right to a hearing, it had no underlying property interest to be protected by such a hearing, and hence under well-

established precedent of this Court denial of any hearing right would not result in the deprivation of a constitutional right. *See* KPP Opp. at 23-24. Moreover, any right of CURB to be heard as an intervenor was necessarily limited by the deemed approval statute applicable to the KCC proceeding in which it intervened. *See Hukle v. City of Kansas City*, 512 P.2d 457, 463 (Kan. 1973) (intervenor accepts the proceedings as it finds them at the time of intervention). CURB's intervention was thus subject to KPP's statutory substantive right to have a decision or a deemed approval within 240 days.[8] In any event, CURB, like WNG, was in fact heard in the KCC proceeding and had every opportunity to urge its positions to the KCC and to the Kansas courts.

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[8] CURB seems to suggest that this Court could simply edit the 240-day limitation or the deemed approval provision out of the statute, or rewrite it in some other manner so that the KCC could retain the power to suspend or invalidate KPP's contracts without being subject to the time limitations on that power imposed by the Kansas legislature. CURB Pet. at 4-5. Such a rewriting of the statute would be convenient to CURB's argument, but is wholly contrary to the purpose and history of the statute and to Kansas law. *See* KPP Opp. at 18-19.

CONCLUSION

For the foregoing reasons, CURB's petition for a writ of certiorari should be denied.

Respectfully submitted,

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